IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.480 OF 2004

M/s Oil and Natural Gas Corporation Ltd. ... Petitioners

v/s

Thermax Ltd. ... Respondents

Mr Rajiv Kumar with Mr Aftab Diamondwala and Ms Shweta Patrawala i/b M/s Divya Shah Associates for Petitioners.

Mr D.D. Madon with Ms Minakshi Iya i/b M/s Doijode Associates for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 29TH AUGUST 2005.

P.C. :-

1. By this petition filed under section 34 of the Arbitration and Conciliation Act 1996, the petitioners challenge the award dated 23rd July 2004 made by the Arbitral Tribunal. By that award, the Arbitral Tribunal has directed the petitioners to pay the amount towards liquidated damages to the respondents. The facts that are relevant for deciding this petition have been narrated in detail in the award. For the purpose of deciding this petition, what is relevant is the letter dated 25th September 2001 whereby the petitioners amended the supply order of Pour Point Depressant and increased it from 838 MT to 1948 MT. As per that order, the increased quantity of 1110 MT was to be supplied as follows :-

1) 250 MT within 30 days of amendment i.e. 24th October 2001.

2) 400 MT within 60 days from the date of amendment i.e. 24th November 2001.

3) 460 MT within 90 days from the date of amendment i.e. 24th December 2001.

. Admittedly, this quantity was supplied by the respondents in following manner :-

a) On 18th October 2001, 180 MT of material was offered for inspection and the material was actually supplied on 29th November 2001.

b) On 10th December 2001, 207 MT of material was offered for inspection and the material was actually supplied on 11th December 2001.

c) On 26th December 2001, 328.86 MT of material was offered for inspection and the material was actually supplied on 11th/12th February 2001.

d) On 14th January 2002, 394.14 MT of material was offered for inspection and the material was actually supplied in May 2002 after the High Court made an order in a writ petition filed by the respondents.

. While making payment for the first lot of 180 MT, the petitioners claimed liquidated damages as per

the contract and deducted the amount. Similarly, the petitioners claimed liquidated damages in respect of second lot of 207 MT and deducted the same while making payment. In so far as the third lot is concerned, the liquidated damages were levied and deducted while making payment of price of the material. So far as the last lot of 394.14 MT is concerned, under the orders of the High Court, without prejudice to the contentions of the rival parties, payment was made at a lesser rate and liquidated damages were also deducted. The Arbitrators, by the award, have held that the petitioners were not justified in levying liquidated damages in relation to the first lot and the fourth lot and that in relation to the fourth lot, the respondents are entitled to payment of price at the rates agreed between the parties in the contract. The Arbitrators therefore in so far as the first lot of 180 MT is concerned, directed refund of amount of liquidated damages which was deducted by the petitioners and in so far as fourth lot is concerned, directed refund of the liquidated damages deducted by the petitioners and also payment of price at contractual rate. The Arbitrators have also directed payment of interest on the awarded amount. In the petition, the petitioners challenge the award made on all the three aforesaid grounds. The respondents have not challenged the award of the Arbitrators in so far as it rejects its claim in relation to the second and third lots. So far

as the award awarding interest is concerned, the learned counsel appearing for respondents conceded that in view of the clause int he contract, the Arbitral Tribunal was not justified in awarding interest and therefore, that part of the award by which interest has been awarded by the Arbitral Tribunal is therefore liable to be set aside.

2. So far as the award in relation to the last lot is concerned, the Arbitral Tribunal has held that the respondents are entitled to payment at the contractual rate because the contract was not terminated by the petitioners at any point of time. Admittedly, the term in the contract is that if there is delay in delivering the quantity, the petitioners can levy damages and can also terminate the contract after giving notice. Admittedly, no notice terminating the contract was given and therefore, the only option was to levy damages in case the petitioners find that there is delay in making the delivery. After having heard the learned counsel for petitioners, I do not find that there is any patent error of law in the finding recorded by the learned Arbitral Tribunal that in the absence of termination of contract by giving notice in terms of the contract, the petitioners are liable to get price of the material as agreed between the parties in the contract. So far as the finding of the Arbitral Tribunal in

relation to the levy of damages in respect of last lot is concerned, the Arbitral Tribunal has relied on a term in the contract which in clear terms lays down that the date of delivery would be date on which the sample is offered for inspection. Perusal of clause 14.3 leaves no manner of doubt that the date of delivery of the material would be the date on which the material is offered for inspection. This view taken by the Arbitral Tribunal that the date of delivery is the date on which material is offered for inspection, then the Arbitral Tribunal has rightly recorded a finding on the basis of material on record that the material was offered for inspection within the time fixed by the parties. Therefore, I do not find any substance in the challenge raised to the award in relation to the last lot of 394.18 MT of material.

3. The award made by the Arbitral Tribunal in relation to the first lot is concerned, it was submitted before me that the Arbitrators relying on clause 14.3 of the contract have held that as the sample was offered for inspection on 18th October 2001, the delivery of the material was on 18th October 2001 and therefore, as the delivery was before the time fixed for delivery of the first lot by the letter dated 25th September 2001, there could not be levy of liquidated damages. It was submitted that in fact, under the letter dated 25th

September 2001, the first lot was requisitioned for 250 MT, however, after giving samples on 18th October 2001, the material delivered was 180 MT. Therefore, the Arbitral Tribunal could not have said that the first lot was delivered within the time. In the submission of the learned counsel therefore, the Arbitral Tribunal could not have recorded a finding that damages could not have been levied for late delivery of the first lot.

4. On behalf of the respondents, on the other hand, it is submitted that out of 250 MT of material that was to be supplied before 24th October 2001, samples of 180 MT of material were submitted on 18th October 2001, samples of balance 70 MT were subsequently submitted and delivery was given. Because material of 70 MT was delivered late, the ONGC levied damages and deducted them from the payment due to the respondents and the respondents have not made any grievance about it. It is further submitted that in the petition, not only that it was not the case of the petitioners before the Arbitrators that because of short delivery of the material in the first lot, delivery date of the first lot could be taken to be the date when entire lot was delivered, but in the petition also, this ground has not been raised. After having perused the record, in my opinion, though general pleadings are made, the grounds are not raised. However, it is apparent that though the

letter dated 25th September 2001 contemplated delivery in three lots, one of 250 MT, second of 400 MT and third of 460 MT, the delivery was not made exactly of that quantity. That was also accepted by the respondents. In my opinion, only because entire quantity of 460 MT was not supplied in the first lot on or before 24th October 2001, it would not be appropriate to permit the petitioners to levy liquidated damages also in relation to 180 MT which has been delivered in time. In my opinion, once the finding of the Arbitral Tribunal that the date of delivery for the lot is the date on which the sample from the lot is given for inspection, then the sample of material of 180 MT was given for inspection on 18th October 2001 and therefore, at least in relation to material of 180 MT, damages cannot be permitted to be levied. Same is the case even in relation to supply of material of 394.14 MT. Because small part of that lot is undelivered, in my opinion, levying liquidated damages would be unreasonable. Therefore, I do not find any justification to modify the award made by the Arbitral Tribunal in relation to the first lot. In the result therefore, the petition succeeds in part and is allowed. That part of the award by which interest has been awarded by the Arbitral Tribunal on the awarded amount is set aside by consent of parties. The award stands modified to that extent.

No order as to costs.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary of this Court as true copy.

. Certified copy expedited.